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75-6933

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1975

NATHANIEL BROWN

Petitioner

vs.

STATE OF OHIO

Respondent

****

PETITION FOR A WRIT OF CERTIORARI
To the Court of Appeals of Ohio,
Eight Appellate District

****

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PETITION FOR A WRIT OF CERTIORARI
To the Court of Appeals of Ohio,
Eight Appellate District

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the Unites States:

Petitioner, Nathaniel Brown, prays that a Writ of Certiorari issue to review the judgment of the Ohio Court of Appeals, Eight Appellate District, which judgment became final on March 19, 1976 when the Supreme Court of Ohio denied further appellate review.

Opinions of the Courts Below

The journal entry of the Ohio Court of Appeals, not published, appears in the Appendix, infra at page 13. The journal entry of the Ohio Court of Appeals overruling a motion for reconsideration appears in the Appendix, infra at page 19. The journal entry of the Supreme Court of Ohio denying further appellate review appears in the Appendix, infra at page 20.

Jurisdiction

The judgment of the Ohio Court of Appeals, Eight District, was announced December 11, 1975, which judgment was entered on December 31, 1975 when a timely motion for reconsideration was overruled. The Supreme Court of Ohio denied further state appellate review on March 19, 1976. The jurisdiction of this Court is invoked under Title 28 U.S.C. §1257(3) in that the rights, privileges and immunities under the United States Constitution have been violated.

Question Presented

Can the state charge and convict a defendant of stealing a certain motor vehicle when the state has already charged and convicted the same defendant of the lesser included offense of operating the same motor vehicle without the owner's consent and both charges grow out of the same act?

Constitutional and Statutory Provisions Involved

Constitution of the United States
Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Ohio Revised Code

§ 4549.04 Stealing motor vehicles.

(A) No person shall steal any motor vehicle.

(B) No person shall purposely take, operate, or keep any motor vehicle without the consent of its owner, and either remove it from this state, or keep possession of it for more than forty-eight hours.

(C) No person shall, with intent to defraud, hire a motor vehicle or operate or keep a motor vehicle which has been hired. It is prima-facie evidence of an intent to defraud if the offender does any of the following:

(1) Hires the motor vehicle by means of any false representation or by means of the unlawful use of a credit card;

(2) Hires the motor vehicle knowing he is without sufficient means to pay the hire;

(3) Absconds without paying the hire for the motor vehicle;

(4) Knowingly fails to pay the hire for the motor vehicle on its return, in the absence of a prior agreement for extended credit, without reasonable excuse for such failure;

(5) Knowingly fails to return the motor vehicle as required by the contract of hire, without reasonable excuse for such failure.

(D) No person shall purposely take, operate, or keep any motor vehicle without the consent of its owner.

(E) No person shall receive, buy, operate, conceal, or dispose of a motor vehicle that was obtained by means of an auto theft offense, knowing or having reasonable cause to believe it to have been so obtained.

Statement of the Case

On December 8, 1973, petitioner, Nathaniel Brown, was arrested in the City of Wickliffe, Lake County, Ohio, and charged with violation of Ohio Rev. Code 4549.04(D), repealed 1/1/74, operating a motor vehicle without the owner's consent. The affidavit alleged December 8th as the date of the offense and that the motor vehicle was owned by Gloria Ingram. Petitioner plead guilty to the charge on December 10th in the Willoughby Municipal Court and was sentenced to 30 days in the Lake County Workhouse and fined $100.00 and costs.

While incarcerated in the Lake County Workhouse, the City of East Cleveland, Cuyahoga County, Ohio, charged petitioner with violation of Ohio Rev. Code 4549.04(A), repealed 1/1/74, stealing a motor vehicle. The complaint alleged November 29, 1973 as the date of the offense and that the automobile was owned by Gloria Ingram. The serial number of the automobile was the same as that alleged in the affidavit before the Willoughby Municipal Court.

On January 11, 1974, after petitioner was released from the Lake County Workhouse, petitioner answered the charge in the East Cleveland Municipal Court and plead former jeopardy. The Municipal Court denied the plea after oral argument and bound petitioner over the Cuyahoga County grand jury.

On Febuary 5, 1974, the Cuyahoga County grand jury returned an indictment against petitioner charging violation of Ohio Rev. Code 4549.04(A), with a second count charging violation of the lesser included offense of Ohio Rev. Code 4549.04(D). The indictment alleged that the automobile was owned by Gloria Ingram and that the offense took place on November 29th, 1973.

On March 18, 1974 a pretrial hearing was had in the Common Pleas Court of Cuyahoga County. The Defense informed the court that it wished to plead former jeopardy.[1] The trial court advised that it would accept a plea of guilty to the count charging violation of Ohio Rev. Code 4549.04(A) but would entertain a motion to withdraw the plea and dismiss the indictment on the grounds of double jeopardy. The State agreed petitioner would be permitted to file the motion.[2] Petitioner entered a conditional plea of guilty and the "count" charging violation of Ohio Rev. Code 4549.04(D) was nolled.[3]

Petitioner subsequently filed a motion to withdraw plea and dismiss the indictment on the grounds of double jeopardy. The trial court overruled the motion on November 26, 1974 and placed petitioner on probation.

Petitioner appealed his conviction to the Ohio Court of Appeals, Eight District. The court held that Ohio Rev. Code 4549.04(D) is a lesser included offense to Ohio Rev. Code 4549.04(A) and for the purposes of double jeopardy both were the same offense. (Journal Entry, p.4; Appendix, p.16) But the court affirmed. It held that although both offenses were the same, because two different dates were alleged the two convictions were premised on different acts. (Journal Entry, p.5;Appendix, p17)

Petitioner filed a timely motion for reconsideration arguing that both charges were based on a continuous act and subject to but one prosecution. The Court of Appeals denied the motion.

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1. Petitioner did not plead former jeopardy at the time of his arraingment on Febuary 19, 1974, for the reason that such plea at arraignment in Ohio is not permitted. See Author's Text, Ohio Crim. R. 11 and 12.

2. Of course, petitioner did not waive his right to assert the double jeopardy claim by pleading guilty. Menna v. New York, __U.S.__, 46 L. Ed. 2d 195, 197 (1975); Blackledge v. Perry, 417 U.S.21, 29-31, 40 L. Ed. 2d 628, 635-636 (1974).

3. For reasons that follow, the second "count" was superfluos and its nolle a nullity inasmuch as it is a lesser included offense to Ohio Rev. Code 4549.04(A). See Mullreed v. Kropp(6th Cir.) 425 F. 2d 1095, 1100 (1970).

Petitioner then appealed to the Supreme Court of Ohio. On March 19, 1976, the appeal was dismissed for the stated reason that, "...no substantial constitutional question exists herein."

Reasons for Granting the Writ

In Waller v. Florida, 397 U.S. 387, 25 L. Ed. 2d 435 (1970), this Court recognized the principle that a state is barred from seeking a prosecution of an offense when the state has obtained a conviction of a lesser included offense and both prosecutions are premised on the same act.[4] Waller, supra at 390 and 438. Although not cited in Waller, the Court's recognition of the prohibition is based on the doctrine in Blockburger v. United States, 284 U.S. 299, 76 L. Ed. 306 (1932); see In re Nielson, 131 U.S. 176, 187-191, 33 L.Ed. 118, 121-123 (1889). In Blockburger is was held that notwithstanding two distinct statutory provisions, unless each requires proof of an additional fact which the other does not, prosecution for both charges is barred. Blockburger, supra at 304 and 309.

The Ohio Court of Appeals for the Eight District agreed that the Blockburger doctrine is applicable to the instant case.[5] (Journal Entry, p. 3; Appendix,

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4. The more significant holding in Waller is of course that a municipality and the state are but one sovereign and that both can not do separately what neither can do individually. However, before the Court could reach this holding it had to find an infringement of the Double Jeopardy Clause based on the net effect of both convictions. It found such an infringement when the Court assumed that the first conviction in Waller was a lesser included offense to the second conviction. In the instant case, the two charges were brought by two different counties. The Court of Appeals held however, that this was not at issue. (Journal Entry, p. 2-3; Appendix, p.

5. The Blockburger doctrine was the law of Ohio eight years before the Blockburger decision. Duvall v. State, 111 Ohio St. 657, 665-666 (1924).

p. 15) The Court of Appeals further agreed that the facts in the instant case meet the test. That is, the charge in the Willoughby Municipal Court of operating a motor vehicle without the owner's consent in a lesser included offense to the charge of motor vehicle stealing as charged in the Common Pleas Court of Cuyahoga County. But as the Court of Appeals held:

> To prevail on his double jeopardy argument, however the appellant must also show that the two prosecutions are premised on the same operative act. This, appellant has failed to do. (Journal Entry, p. 4-5; Appendix, p. 16-17)

This is directly at odds with another statement in the Entry:

> It is undisputed that the automobile involved in the Lake County charge and the automobile involved in the Cuyahoga County charge is the same vehicle. (Journal Entry, p. 2; Appendix, p. 14)

By basing its decision on the fact that the first prosecution alleged December 8th as the date of the offense and the second prosecution alleged November 29th as the date of the offense, the Court of Appeals failed to realize the nature of a theft offense and the respective elements of the offenses charged. This failure results in some illogical conclusions.

First, because all of the elements of operating a motor vehicle without the owner's consent are included in the charge of motor vehicle stealing, the instant the car was allegedly stolen on November 29th, it, by definition, was also being operated without the owner's consent. Consequently, both charges grew out of the same act. Both the charge of motor vehicle stealing and operating continued from November 29th to December 8th and constituted one continuous act. It has never been alleged that the automobile was returned to the owner between November 29th and December 8th, and then taken a second time. It is

impossible for either or both to have ceased sometime between those two dates and thereby constituting a separate offense(s).

Second, the lesser charge of operating is alleged to have been committed subsequent to the greater charge of motor vehicle stealing. On its face this is a contradiction of the doctrine of lesser included offenses. A lesser offense often does evolve into a greater offense when the additional elements are supplied. But under the Court of Appeals' reasoning it appears the reverse is true. That is, all of the elements of the greater offense could be present at a certain time but subsequnetly some of the elements dissipate leaving only the lesser included offense.

The reasoning of the Court of Appeals can not be allowed to stand. The decision not only ignores the nature of a theft offense in relation to the Double Jeopardy Clause, but also raises policy questions that render the Double Jeopardy Clause meaningless with respect to theft offenses or any other offense that is continuous by its nature.

I

A theft offense is by its nature a continuing offense. The Supreme Court of Ohio when commenting on the crime of concealing stolen property has stated it "...is a continuous act, as long as the property remains in control of the concealer, its continued control does not create new offenses from day to day... ." State v. Smith, 59 Ohio St. 350, 365, (1898). The same rule should also apply to actual taking. The actual taking does not exist in a vaccum without additional intent to keep the property no matter what the period of time.

The test for whether an act is continuous by its nature was quoted by this Court in United States v. Midstate Horticultural Company, Inc., 306 U.S. 161, 83 L. Ed. 563 (1939):

> A continuing offense is a continuous, unlawful act or series of acts set on foot by a single impulse and operated by an unintermittent force, however long a time it may occur. Id., at 166 and 567.

Other cases by this Court have considered the impulse or nature of the act in determining whether an act is continuous. E.g., Blockburger v. United States, 284 U.S. 299, 302, 76 L. Ed. 306, 308 (1932), (Selling different drugs on two different days is not a continuous act.); United States v. Kissel, 218 U.S. 601, 607, 54 L. Ed. 1168 (1910), (Conspriacy); In re Nielson, 131 U.S. 176, 185-187, 33 L. Ed. 118, 121 (1889); In re Snow, 120 U.S. 273, 281, 30 L. Ed. 658, 661 (1887), (Cohabitation with more than one woman for a three year period is one offense, "...inherently a continuous offense...")

The offense of motor vehicle stealing continues from the instant all of the elements of the offense are present and does not terminate until prosecution. Similiarly, the offense of operating a motor vehicle terminates upon prosecution but has continued from the very instant all of the elements were present. Each offense has a time continuum with a beginning and an end. And whenever prosecution attaches to one point on the continuum, it necessarily also attaches to the entire continuum.

Applied to the instant case, the State alleges that all of the elements of motor vehicle stealing were present on November 29, 1973. At any point thereafter all of the elements of operating were also present. Consequently, when the State prosecuted for operating on December 8, 1973, it was necessarily

also prosecuting for the same act that had started on November 29th whether it be motor vehicle stealing or operating.

This Court must grant the writ of certiorari and hold that theft offenses are continuous acts and can not be "split" to avoid violation of the Fifth Amendment Double Jeopardy Clause.

II

Lurking in the backgound of this case are certain policy considerations that the Double Jeopardy Clause seeks to protect. To allow the decision to stand will give impetus to the tendency of lax law enforcement. It will also completely emasculate the purpose of the Double Jeopardy Clause.

If the States wishes to prosecute for a greater offense, or for that matter any offense, they should do so at the first opportunity. Both the State and the accused benefit when the evidence is fresh. If the State had sufficient evidence to prove the offense of motor stealing the Lake County, Ohio authorities should have pressed for it in Lake County. The Lake County authorities presumably had all the information and resources available to them that the Cuyahoga County authorities.[6]

Moreover, to allow the decision to stand will permit law enforcement authorities to circumvent the Double Jeopardy Clause by arbitrarily alleging different dates. Indeed, under the Court of Appeals' holding each infinitesimal

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6. See Ohio Rev. Code 2931.23, repealed 1/1/74, but in effect at the time of petitioner's first conviction in Lake County:

"Whoever steals the property of another in one county of this state, and takes the same into another county, may be prosecuted, convicted, and punished in any county into or through which such stolen property was taken by him. The conviction or acquittal of such person of stealing such property in one county is a bar to another prosecution for such offense."

instant from November 29, 1973 to December 8, 1973, could have been the basis for a different charge subjecting petitioner to additional punishment.[7]

When petitioner, who was not represented by counsel in Lake County, plead guilty in Lake County he was lulled into a false sense of security. As far as petitioner knew, he was to serve 30 days in the Lake County Workhouse and upon release the matter was to be over. But it was not over. Upon release he had to face the greater charge of motor vehicle stealing in Cuyahoga County.

> ...the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty. Green v. United States, 355 U.S. 184, 187-188, 2 L. Ed. 2d 199, 204 (1957).

7. Compare In re Snow, 120 U.S. 274, 282, 30 L. Ed. 658, 662 (1887), "The division of the two years and eleven months is wholly arbitrary. On the same principle there might have been an indictment covering each of the thirty-five months, with imprisonment for seventeen years and a half and fines amounting to $10,500, or even an indictment covering every week, with imprisonment for seventy-four years and fines amounting to $44,400; and so on ad infinitum, for smaller periods of time. ...and it was the mere will of the grand jury which divided the time among three indictments, and stopped short of dividing it among thirty-five, or one hundred and fifty-two, or even more."

Conclusion

For the foregoing reasons, a writ of certiorari should issue to the Ohio Court of Appeals, Eight Appellate District, to review the judgment entered against petitioner.

Respectfully submitted,

Robert Plautz

Robert Plautz, of counsel

Glenn Billington

Glenn Billington, Member of the Bar of The Supreme Court

Certificate of Service

I, Robert Plautz, do swear, that on the 14th day of June, 1976, I placed the foregoing Petition for Certiorari in the United States Mail, with first class postage prepaid, and the same was addressed to John T. Corrigan, Prosecutor of Cuyahoga County, Ohio, at 1560 East 21st Street, Cleveland, Ohio 44114.

Robert Plautz

Robert Plautz

Sworn to, before me and subsribed in my presence, this 14th day of June, 1976.

Glenn Billington

Notary

GLENN E. BILLINGTON, Attorney
NOTARY PUBLIC - STATE OF OHIO
My commission has no expiration date.
Section 147.03 R.C.

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT
COUNTY OF CUYAHOGA

NO. 34316

STATE OF OHIO

APPELLEE

-vs-

NATHANIEL BROWN

APPELLANT

APPEAL FROM

COMMON PLEAS COURT
(Criminal)
No. 12062

JOURNAL ENTRY

DATE DEC 11 1975

This cause came on to be heard upon the pleadings and the ..... transcript of the evidence and the record in the Common Pleas Court, and was argued by counsel for the parties; and upon consideration, the court finds no error prejudicial to the appellant and therefore the judgment of the Common Pleas Court is affirmed. Each assignment of error was reviewed and upon review the following disposition made:

On November 29, 1973 an automobile was stolen from a parking lot in East Cleveland. On December 8, 1973, the appellant was arrested in Lake County, and charged with operating a motor vehicle without the owner's consent in violation of R. C. 4549. 04(D) (repealed 1-1-74). Appellant plead guilty to the charge in Willoughby Municipal Court and was sentenced to 30 days in the county workhouse and fined $100 and costs.

On February 5, 1974, the Cuyahoga County grand jury indicted appellant for auto theft (R. C. 4549. 04(A), repealed 1-1-74) and operating a motor vehicle without the owner's consent (R. C. 4549. 04(D), repealed 1-1-74). On March 18, 1974 the appellant plead guilty to auto theft with the understanding that a motion to dismiss

to raise the issue of double joepardy could be filed. The second count of the indictment was nolled. It is undisputed that the automobile involved in the Lake County charge and the automobile involved in the Cuyahoga County charge is the same vehicle. Appellant's motion to dismiss was overruled.

The appellant appeals the overruling of his motion to dismiss assigning the following error:

> "The trial court erred in overruling defendant's motion to withdraw plea and dismiss the indictment against him on the grounds of double jeopardy where the defendant had plead guilty and been convicted of operating a motor vehicle without the owner's consent in a municipal court under Ohio Rev. Code 4549. 04(D) and the indictment charged automobile stealing under Ohio Rev. Code 4549. 04(A) and both the affidavit in the municipal court and the indictment are based on the same act. "

In State of Ohio v. Best (1975), 42 Ohio St. 2d 530, the Ohio Supreme Court stated that:

> "2. To sustain a plea of former jeopardy it must appear:
> (1) That there was a former prosecution in the same state for the same offense;
> (2) that the same person was in jeopardy on the first prosecution;
> (3) that the parties are identical in the two prosecutions; and
> (4) that the particular offense, on the prosecution of which the jeopardy attached, was such an offense as to constitute a bar. "

There is no dispute that the appellant was the person in jeopardy on the first prosecution or that the parties are identical in the two prosecutions. The fact that the Lake County prosecution was brought in the name of the City of Wickliffe, and the Cuyahoga County prosecution was brought in the name of the State of Ohio does not defeat identity of parties. For purposes of double jeopardy, state and municipal governments are considered as a single sovereign. Waller v. Florida (1970), 397 U. S. 387, 25 L. Ed. 2d 435; and State of Ohio vs. Best, supra. The

real issue in this case is whether or not the Cuyahoga County prosecution is for the same offense that the appellant was convicted of in Lake County. The double jeopardy clause of the Fifth Amendment to the United States Constitution is a bar to a prosecution only if the defendant was previously prosecuted for the identical offense. State v. Best, supra.

Identity of offense consists of two components: (1) identity of the statutory offense and (2) identity of the operative act. A single act or transaction may violate more than one statutory provision. A prosecution for violation of one such provision will bar prosecutions under the other statutory provisions only if the other provisions proscribe the same offense. The Supreme Court of Ohio has stated the rule to be applied to determine if two distinct statutory provisions proscribe the same offense for purposes of double jeopardy:

> "The applicable rule under the Fifth Amendment is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of a fact which the other does not. A single act may be an offense against two statutes, and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other. (Blockburger v. United States, 284 U. S. 299, and Duvall v. State, 11 Ohio St. 657, followed.)"
>
> State of Ohio v. Best, supra.

In other words, two statutory offenses are the "same offense" for purposes of double jeopardy if proof of the elements of one of the offenses would support a conviction on the other offense or one offense is a lesser included offense of the other offense.

The appellant was charged in the Willoughby Municipal Court with violation of R. C. 4549. 04(D), "No person shall purposely take, operate, or keep any motor vehicle without the consent of its owner." In Cuyahoga County the appellant was charged with violation of R. C. 4549. 04(A), "No person shall steal any motor vehicle."

Every element of the crime of operating a motor vehicle without the consent of the owner is also an element of the crime of auto theft. "The difference between the crime of stealing a motor vehicle, and operating a motor vehicle without the consent of the owner is that conviction for stealing requires proof of an intent on the part of the thief to permanently deprive the owner of possession." State of Ohio v. Ikner (C. A., Cuyahoga Cty., 1974, Case No. 33065), appeal to Ohio Supreme Court pending. Applying the rule laid down in State of Ohio v. Best, supra., the crime of operating a motor vehicle without the consent of the owner is a lesser included offense of auto theft and both offenses are the same offense" for purposes of double jeopardy.

The appellee cites the case of State v. Marcum (C. A. Franklin Cty., 1969), 18 Ohio App. 2d 190 to support their argument that operating a motor vehicle is not a lesser included offense of auto theft. The first syllabus of that case reads as follows:

> "1. The crime of operating a motor vehicle without the owner's consent . . . is not a lesser included offense of the crime of motor vehicle theft...."

We do not find this case persuasive because the body of the opinion itself never discusses the issue of whether or not operating a motor vehicle without the owner's consent is a lesser included offense of auto theft. Also, the first paragraph of the court's opinion contradicts the courts' statement in the first syllabus.

> "The jury returned a verdict of 'not guilty to auto theft. They did find him guilty of a lesser included offense - operating a motor vehicle without the owner's consent."
>
> State v. Marcum, supra. at 191.

Since R. C. 4549. 04(D) is a lesser included offense of R. C. 4549. 04(A) appellant has established that for purposes of double jeopardy the two prosecutions involve the same statutory offense. To prevail on his double jeopardy argument, however

the appellant must also show that the two prosecutions are premised on the same operative act. This, appellant has failed to do. The charge in Cuyahoga County arose out of a theft which occurred on November 29th in East Cleveland. The charge in Lake County arose out of the actions of the appellant in operating the car in Lake County on December 8th. The two prosecutions are based on two separate acts of the appellant, one which occurred on November 29th and one which occurred on December 8th. Since appellant has not shown that both prosecutions are based on the same act or transaction, the second prosecution is not barred by the double jeopardy clause.

Appellant also argues that the doctrine of "merger" precludes the imposition of separate sentences for violations of R. C. 4549. 04(A) and R. C. 4549. 04(D). The doctrine of "merger" precludes separate sentences on multiple convictions when the convictions are based upon the same act. State v. Botta (1971), 27 Ohio St. 2d 196; State v. Ikner, supra. As noted above, the two convictions were based on two distinct acts and not the same act; therefore, the doctrine of merger is inapplicable.

Appellant's assignment of error is not well taken. The judgment of the Court of Common Pleas is affirmed.

It is ordered that appellee recover of appellant ____its____ costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

CORRIGAN, P.J., _____

MANOS, J., _____

SILBERT, J., CONCUR. _____
(Silbert, J., Retired Judge of the Eighth Appellate District, Sitting by Assignment)

John V. Corrigan
PRESIDING JUDGE
JOHN V. CORRIGAN

N.B. This entry is made pursuant to the third sentence of Rule 22D, Ohio Rules of Appellate Procedure. This is an announcement of decision, (see Rule 26). Ten (10) days from the date hereof this document will be stamped to indicate journalization, at which time it will become the judgment and order of the court and time period for review will begin to run.

For plaintiff appellee: John T. Corrigan

For defendant appellant: Robert Otto Carson

COPIES MAILED TO COUNSEL FOR ALL PARTIES. — COSTS TAXED.

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT, CUYAHOGA COUNTY

EMIL J. MASGAY, CLERK OF COURTS

State of Ohio
vs. APPELLee

Nathaniel Brown
APPELLant

COURT OF APPEALS NO. 34316

LOWER COURT NO. C.P. 12062-Cr.

MOTION NO. 31620

DATE December 31, 1975

JOURNAL ENTRY

Motion by appellant for reconsideration overruled. Exc.

RECEIVED FOR FILING

DEC 31 1975

GERALD E. FUERST
By Deputy

CORRIGAN, P.J.,

MANOS, J.,

SILBERT, J., CONCUR.
(Silbert, J., Retired Judge of the Eighth Appellate District, Sitting by Assignment)

PRESIDING JUDGE
JOHN V. CORRIGAN

COPIES MAILED TO COUNSEL FOR
[illegible] — COSTS TAXED.

BOOK 61 PAGE 969

IN THE SUPREME COURT OF OHIO

Case No. 76-224

STATE OF OHIO

Appellee

vs.

NATHANIEL BROWN

Appellant

APPEAL FROM THE COURT OF APPEALS FOR
CUYAHOGA COUNTY

This cause, here on appeal as of right from the Court of Appeals for Cuyahoga County, was heard in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exits herein.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1975

NATHANIEL BROWN

Petitioner

vs.

STATE OF OHIO

Respondent

75 - 6933

****

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

****

Petitioner, Nathaniel Brown, asks leave to file the attached Petition for a Writ of Certiorari to the Ohio Court of Appeals, Eight Appellant District, without payment of costs and to proceed in forma pauperis pursuant to Rule 33.

Petitioner's affidavit is support of the motion is attached.

Respectfully submitted,

Robert Plautz

ROBERT PLAUTZ,
of counsel

Glenn Billington

GLENN BILLINGTON,
Member of the Bar of The
Supreme Court

Attorneys for Petitioner

STATE OF OHIO)
COUNTY OF CUYAHOGA) S.S. AFFIDAVIT

I, Nathaniel Brown, being first duly sworn despose and say:

1. I am the petitioner in the above entitled cause.

2. Because of my poverty I am unable to pay costs of said cause.

3. I am unable to give security for the cause.

4. My mother has in the past paid to my attorney, Robert Plautz, some money to defend me and prosecute my appeals but she is unable to pay any further money.

5. I believe I am entitled to redress in said cause.

6. The nature of said cause is briefly stated as follows:

On December 10th, 1973, I plead guilty to the charge of operating a motor vehicle without the owner's consent. At the time of pleading guilty I was not represented by counsel and thought the matter was to be over after I served my sentence of 30 days in the Lake County Ohio Workhouse. However, while I was incarcerated there I was charged with the greater offense of stealing a motor vehicle. Both the charge of operating a motor vehicle without the owner's consent and stealing a motor vehicle are based on the same act. To charge me with me motor vehicle stealing after already having been convicted of operating the same motor vehilce without the owner's consent is in violation of my Fifth and Fourteenth Amendment rights of the United States Constitution.

Nathaniel Brown
Nathaniel Brown

SWORN TO, AND SUBSRCIBED, in my presence, this 14th day of June, 1976.

Glenn Billington
Notary

GLENN E. BILLINGTON, Attorney
NOTARY PUBLIC - STATE OF OHIO
My commission has no expiration date.
Section 147.03 R.C.